United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-6121

To be argued by
SAMUEL RESNICOFF

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ANNICK M. BERNS,

Plaintiff-Appellee,

against

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, Comptroller, City of New York,

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PLAINTIFF-APPELLEE'S BRIEF

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Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Southern District of New York.

PLAINTIFF-APPELLEE'S BRIEF

In December of 1972, the defendant CIVIL SERVICE COMMISSION advertised an open competitive written civil service examination to be held February 3, 1973 for the position of POLICE ADMINISTRATIVE AIDE (pp. 21a-22a). The said announcement provided in part as follows (p. 21a):

> "MINIMUM REQUIREMENTS: High school graduation or evidence of having passed an examination for a high school equivalency diploma or U. S. Armed

> Forces GED certificate with a score of at least 35 on each of the five tests and an overall score of at least 225 in the examination for the diploma or certificate; and either two years of paid full-time clerical experience, or two years of active military duty, or one year of full-time study (30 credits) in an accredited college or university, or an equivalent combination of experience and education. However, high school graduation or its equivalent as described above is required of all candidates."

Plaintiff filed an application to compete in said open competitive written examination. The CIVIL SERVICE COMMISSION marked her eligible and thereafter she received an admission card which permitted her to take the examination. Plaintiff successfully passed the written examination and received a grade of 86.300% (pp. 10a, 125a).

Prior to April 30, 1973, vacancies arose for said position. The CIVIL SERVICE COMMISSION having found plaintiff to be qualified for appointment certified her name as eligible for probationary appointment as a POLICE ADMINISTRATIVE AIDE. On April 30, 1973, she was duly appointed from the eligible list and was required to serve a probationary period of six months which expired on October 29, 1973 (p. 10a). Plaintiff's services were satisfactory and she was retained as a permanent POLICE ADMINISTRATIVE AIDE.

By notice dated November 6, 1974, defendant D'AMBROSE advised plaintiff she was marked not qualified for the position of Police Administrative Aide because of "failure to meet educational requirements" (p. 35a). The

POLICE DEPARTMENT protested the proposed termination of plaintiff (pp. 36a,37a,42a).

By notice dated February 26, 1975, defendant CIVIL SERVICE COMMISSION without a hearing denied plaintiff's appeal (pp. 38a, 41a).

THE FACTS

Plaintiff who is a citizen of the United States and a resident of the State of New York was born and educated in France (p. 5a).

In the civil service announcement for POLICE ADMINISTRATIVE AIDE (p. 21a), no mention was made that graduation from a New York City High School would only be recognized. Moreover, the said announcement stated "However, high school graduation or its equivalent as described above is required of all candidates."

The educational system in France is different than that which exists in New York City. In France, there are two cycles of education. The first cycle of education is for children between the ages of 6 and 11. This is called Lycees. After four years of schooling, those students who show academic talents or traits and characteristics

which are superior to other students are advanced and given secondary education (p. 118a). In the Parochial schools in France, secondary education can be completed in four years or less.

Plaintiff was considered a rapid progress student and was advanced to secondary education which she completed in four years. In June of 1957, after successfully completing eight years of continuous schooling at ECOLE-PRIVEE DE FILLES a Parochial School in Paris, plaintiff was graduated and received her Diploma (p. 118a).

In France, there is a screening period at the end of four years. Each student is carefully examined and a determination is made whether said student is sufficiently advanced for secondary education. Tests are also made to determine aptitude, vocational leanings and academic tendencies. Plaintiff was considered a progressive student and was advanced to secondary education. As a secondary student which was equivalent to high school, her courses were not elementary. She took and successfully passed courses in Algebra, Chemistry, two foreign languages (English and Spanish), Geometry, Literature, Mathematics, World History, French History, Natural Sciences which included Botany,

Music and Art. Upon her graduation in 1957, plaintiff continued her education at the ECOLE-PRIVEE DE FILLES until 1959. All of the courses which she completed were of an advanced Academic nature (p. 119a).

In her application which she submitted to the CIVIL SERVICE COMMISSION, plaintiff submitted a Certificate of Completion from the ECOLE-D'HOTESSES DE PARIS, where she completed Finishing Courses in Psychology, Current Events, Current Affairs, Politics and Poise. In this connection, Judge TENNEY below held (pp. 131a-132a):

> "***while the French and American educational systems are not functional equivalents for the purpose of facilitating a ready comparison, the plaintiff was certainly possessed of a degree of education which entitled her to answer the question regarding her education as she did. Her high achievement on all competitive examinations and her accomplished performance of her police duties butresses and makes this inference inescapable."

On April 30, 1973, plaintiff was duly appointed from the eligible list to the position of POLICE ADMINISTRATIVE AIDE and was required to serve a probationary period of six months. Her services were outstanding (pp. 42a, 36a, 37a, 25a, 27a, 28a, 29a, 30a). Plaintiff's probationary

period of employment expired on October 29, 1973. She could have been terminated at any time prior to the expiration of her probationary period if her services were unsatisfactory. However, since her services were outstanding she was retained. On October 29, 1973, plaintiff became a competitive tenured civil service employee with a property interest in her position.

On November 6, 1974, the defendant D'AMBROSE advised plaintiff she was marked not qualified because of "failure to meet educational requirements." This notice was received by plaintiff approximately two years after she filed her application to take the examination. Her proposed termination brought protests from the POLICE DEPARTMENT (pp. 36a-37a). By letter dated April 7, 1975, Police Inspector JOHN F. RONAN, Commanding Officer, Employment Division, Police Department, requested that plaintiff be retained because of her "outstanding performance" (pp. 13a, 42a). In view of the written protests by the Police Department, plaintiff was continued in her employment pending the outcome of her litigation.

It might not be amiss to point out that at the request of defendant CIVIL SERVICE COMMISSION and the POLICE DEPARTMENT, plaintiff took the High School Eqivalency Test conducted by the NEW YORK STATE EDUCATION DEPARTMENT. Plaintiff received an overall score of 276, which was 51 points more than required (pp. 33a, 11a, 34a).

The statement by the Administrative Police Lieutenant which was concurred in by the Commanding Officer of the Police Department Personnel Services Division (p.36a), to wit:

> "***To hold that she is not qualified by not meeting the educational requirements is a patent absurdity." ———

correctly characterizes the action taken by appellants.

THE ISSUES

The issues in this case are crystal clear. There is no area of discretion involved. Since plaintiff acquired tenure by being retained after the expiration of her probationary period of employment, she acquired a property interest in her position and could not be summarily removed without charges and without a hearing.

Plaintiff was required to serve a probationary period of six months. Having been duly appointed from the eligible list on April 30, 1973, her probationary period expired on October 29, 1973. Under state law, the retention of a probationary employee beyond the period of probation, conferred tenure and permanent status. As a permanent employee, plaintiff could only be removed after charges and a hearing (WEISHAR v. THAYER, 245 App. Div. 393; GOLDSCHMIDT v. BOARD OF EDUCATION, 217 N.Y. 470, and SCHLESINGER v. DeFOREST, 83 App. Div. 410). Since plaintiff became a tenured employee she came directly within BOARD OF REGENTS v. ROTH, 408 U.S. 564, and PERRY v. SINDERMAN, 408 U.S. 593.

Plaintiff claims federal question jurisdiction, 28 U.S.C., Section 1331, violation of constitutional rights under the 14th Amendment, and deprivation of constitutional rights under 28 U.S.C., Sections 1343 (3) and (4). She seeks declaratory relief under 28 U.S.C., Sections 2201 and 2202, and Rule 57, Fed. R. Civ. P., and injunctive relief under 42 U.S.C., Section 1983.

In granting plaintiff's motion for summary judgment, Judge TENNEY held (p. 132a):

> "Both plaintiff and defendants agree that plaintiff's termination was carried out in summary fashion and without the benefit of a hearing. The summary dismissal of a tenured public employee has been held to be a violation of the fourteenth amendment's guarantees of procedural due process. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Vega v. Civil Service Commission, City of New York, 385 F. Supp. 1376 (S.D.N.Y. 1974).
>
> Plaintiff has carried the burden of proving the absence of any genuine issue of material fact and that she is entitled to a judgment as a matter of law.
>
> 'Having satisfactorily completed (her) probationary period and achieved permanent tenured status, plaintiff's 'property interest' in (her) job was entitled to the full panoply of procedural safeguards afforded by the Fourteenth Amendment. Board of Regents v. Roth, supra, Perry v. Sinderman, supra.' Vega v. Civil Service Commission, City of New York, supra, 385 F. Supp. at 1362.'"

In a tenuous attempt to emasculate the virility of plaintiff's contention that her procedural and substantive rights to due process and the equal protection of the laws were violated, appellants maintain that the administrative determination even though adverse to plaintiff should not be reviewed by a Federal Court. This argument make it crystal clear that the appeal herein is utterly devoid of any merit.

The Federal Courts at all levels are now enjoying tremendous prestige and respect. The exalted status of the Federal Judicial structure does not exist merely because it has exclusive jurisdiction in bankruptcy, admiralty, patents or copyrights. Its stature has grown because its Judges have not hesitated to step in and assume jurisdiction of matters which years ago would have been considered exclusively within the domain of the State courts (VELGER v. CAWLEY, 525 F. 2d 334, 2nd Cir.; LOMBARD v. THE BOARD OF EDUCATION, 502 F. 2d 631, 2nd Cir., and ACHA v. BEAME, #75-7388, decided by this Court on February 19, 1976).

POINT I.

SINCE PLAINTIFF WAS A TENURED EMPLOYEE, SHE HAD A PROPERTY RIGHT IN HER POSITION. HER DISMISSAL, THEREFORE, WITHOUT CHARGES AND WITHOUT A HEARING WAS IN VIOLATION OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS.

Judge KNAPP in VEGA v. CIVIL SERVICE COMMISSION, 385 F. Supp. 1376, and Judge NEAHER (E.D.N.Y.) in KEYER V. CIVIL SERVICE COMMISSION, 397 F. Supp. 1362, decided against defendants on the very same issue involved herein.

In the VEGA case, supra, the Commission announced an examination for Correction Officer which provided as follows:

> "Applicants must have passed their twentieth birthday but not their thirty-second birthday on the date of filing their application for civil service examination (date of written test)."

VEGA, a Marine Corps veteran, filed his application. He set forth his age and later received an eligibility card. He passed the examination and his name was then placed on an eligible list. In the interim, he had been permanently employed as a Special Officer, Department of Social Services. The Commission certified his name as eligible for appointment as a probationary Correction Officer. It was necessary for him to resign from his prior tenured position of Special Officer, Department of Social Services. As a probationary Correction Officer, he was required to serve six months of probation which expired on December 10, 1973. Eleven days after having satisfactorily completed his probationary period, Mr. VEGA was summarily dismissed without charges and without a hearing. The Commission claimed he was not qualified because he was over age on the date of the written

test, and since he lacked such minimum requirements his appointment was void ab initio. An action was instituted in the United States District Court for the Southern District of New York. VEGA proceeded on the theory that since he was retained after the expiration of his probationary period he acquired tenure and a property right to his position, and came within BOARD OF REGENTS v. ROTH and PERRY v. SINDERMAN. United States District Judge KNAPP in annulling the dismissal and in directing VEGA's reinstatement, held:

> "In conclusion, the defendants through their own inadvertence overlooked or otherwise neglected to act upon accurate information dutifully supplied to them by plaintiff concerning his age, inducing him to resign his tenured position within the Department of Social Services and 'lulling' him into a false sense of security as to the 'impregnability' of his civil service status. See Abarno v. The City of New York (1956) 3M. 2d 1053, 157 N.Y.S. 2d 513, 522, aff'd 6 A.D. 2d 1040, 178 N.Y.S. 2d 1022. Having satisfactorily completed his probationary period and achieved permanent tenured status, plaintiff's 'property interest' in his job was entitled to the full panoply of procedural safeguards afforded by the Fourteenth Amendment. Board of Regents v. Roth, Perry v. Sinderman, supra."

Although defendants filed a Notice of Appeal to this Court, a stipulation was entered into which provided for VEGA's

reinstatement as a Correction Officer, Department of Correction, together with a payment by defendants to Mr. VEGA.

In the KEYER, et al case instituted in the Eastern District, the issues were similar. In granting injunctive relief, Judge NEAHER held (397 F. Supp. 1362):

> "There can be no question that municipal civil service employees who have successfully passed the six months probationary period may not thereafter be removed from their positions without being afforded a hearing upon stated charges of incompetency or misconduct preferred in writing and served in advance. N.Y. Civil Service Law Sec. 75 n. 8 supra. An employee entitled to such protection but who is summarily dismissed may sue under 42 U.S.C. Sec. 1983 and obtain prompt relief ordering his reinstatement with back pay retroactive to the date of his dismissal. Vega v. Civil Service Commission, City of New York, 385 F. Supp. 1376 (S.D.N.Y. 1974). This remedial principle is recognized in other jurisdictions. See Newcomer v. Goldman, 323 F. Supp. 1363 (D. Conn. 1970), and Roumani v. Leestamper, 330 F. Supp. 1248 (D. Mass. 1971).

Judge NEAHER further held:

> "In cases such as this where prima facie a clear violation of constitutional rights is apparent, courts have not hesitated to order prompt reinstatement with back pay. Although not a preliminary injunction case, Vega v. Civil Service Commission, supra, p. 8, is apposite because of its basic similarity to this case.
>
> In Vega, as here, the plaintiff, a City correction officer, had been summarily dismissed without a hearing. The asserted ground of dismissal

> was the discovery, eleven days after he had satisfactorily completed his probationary period, that he was over age at the time he took the civil service examination and thus disqualified for employment. Vega, as did plaintiffs here, had signed the "Terms and Conditions of Certification and Appointment (or Promotion)" form certifying his understanding that his appointment was conditional and could be terminated if upon subsequent investigation he was found to be not qualified.
>
> In Vega's subsequent Sec. 1983 action, Judge Knapp nonetheless granted him summary judgment, directing the City to reinstate him as a correction officer with back pay. The court held that under the New York cases reviewed in its opinion, 'the Commission has no inherent authority to fire a civil servant once his appointment has become finalized.' 385 F. Supp. at 1380. The City's express contention that Vega's employment was conditional and that Civil Service Law Sec. 50, subd. 4, gave it such authority was rejected. Judge Knapp pointed out that the plaintiff in Vega had truthfully stated the fact of his age and that there was no claim of illegality, irregularity or fraud in the application."

In an attempt to overcome the decisions by the Supreme Court of the United States in BOARD OF REGENTS v. ROTH; PERRY V. SINDERMAN; VEGA and KEYER, appellants have pleaded Section 50 (4) of the New York State Civil Service Law as a defense. That section states in pertinent part:

> "4. Disqualification of applicants or eligibles.

> The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
>
> (Emphasis supplied)
>
> ***
>
> Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications ***or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment***."
>
> (Emphasis supplied)

SECTION 50, supra, is permissive. The word "may" which is used in the statute is not mandatory. When one considers the fact that plaintiff was appointed on April 30, 1973; was retained as a permanent employee at the expiration of her six months probationary period and performed her functions in an outstanding manner, it jars one's sense of fairness to learn after being employed in her position for more than two years that appellants advised her she failed to meet educational requirements. Appellants are guilty of gross and inexcusable laches. Appellants are estopped. Moreover, there is no claim that plaintiff was guilty of any irregularity, illegality or fraud of a substantial nature. Judge KNAPP in the VEGA case commented on appellants neglect and inertia. Judge TENNEY below pointed out that appellants were in possession of plaintiff's application since

December of 1972, but "did not begin the background investigation until March 11, 1974, some fifteen months later (and six months after plaintiff had achieved tenure)."

This principle was also recognized by the New York State Courts in LEONARDO v. CIVIL SERVICE COMMISSION, 40 A.D. 2d 941, 337 N.Y.S. 2d 613. The petitioner in submitting an application for promotion to Sanitation Supervisor answered "NO" to a question on the application as to whether he had ever been arrested. He had been arrested on several occasions but never convicted. He was dismissed even though he held the office of Sanitation Supervisor for about five years. His Article 78 proceeding was dismissed. In vacating the dismissal and in imposing a suspension, the Appellate Division held:

> "Under the circumstances, and in view of his undenied excellent work record, the punishment of removal was excessive and unduly disproportionate to the offense. In the exercise of the power vested in the court (Matter of Bovino v. Scott, 22 N.Y. 2d 214, 217; 292 N.Y.S. 2d 408; Matter of Mitthauer v. Patterson, 8 N.Y. 2d 37, 201 N.Y.S. 2d 321; CPLR, 7803 subd. 3), we conclude that the penalty should be limited to suspension for a period of six months."

The New York State Court of Appeals in unanimously affirming on June 5, 1974 (34 N.Y. 2d 760, 358 N.Y.S. 2d 136), held:

> "The order appealed from should be affirmed, 40 A.D. 2d 941, 337 N.Y.S. 2d 613, without costs. The fraudulent denial of arrests in the petitioner's application for employment may have constituted a valid ground for denial of employment and therefore for dismissal following a reasonable opportunity for discovery. After the passage of an extended period of time, however, in this instance five years, the ground loses its force. It is immaterial whether one regards the basis for ignoring the original fraud as a waiver, estoppel, or laches. Beyond the reasonable time for discovery of the fraud, petitioner should not have been dismissed unless first there had been a showing, either that there was still a valid basis for disqualification to fill the position because of the arrests, or that he had been guilty of misconduct or incompetence in the performance of his duties."

See also GIANCIACOMO v. VILLAGE OF LIBERTY, 375 N.Y.S. 2d 223 __A.D. 2d__.

It might not be amiss to point out that the civil service announcement was vague and ambiguous (p.21a). It merely referred to a high school graduation or its equivalent. It did not state that graduation from a New York City high school would only be recognized. The notice did not define or spell out the meaning of the word "equivalent." After reviewing plaintiff's educational background and the courses which she completed it would be manifestly absurd to contend that plaintiff was not a high school graduate or completed "its equivalent." As stated by Judge TENNEY (p. 132a):

> "Her high achievement on all competitive examinations and her accomplished performance of her police duties buttresses and makes this inference inescapable."

The illuminating opinion by Judge TENNEY is a classic in this area of the law. It has heart, compassion and understanding. It is a sound legal exposition by a Judge who displayed an astute perception in analyzing and dissecting an unconstitutional act on the part of appellants which was obnoxious, offensive and invidious. Both on the law and on the facts, the summary dismissal of plaintiff was in violation of her constitutional rights and denied to plaintiff procedural due process and the equal protection of the laws.

C O N C L U S I O N

THE ORDER AND JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED WITH COSTS AND REASONABLE ATTORNEY FEES SHOULD BE AWARDED.

DATED: New York, March 5, 1976.

Respectfully submitted,

SAMUEL RESNICOFF, Esq.,
Attorney for Plaintiff--Appellee.

UNITED STATES COURT OF APPEALS
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ANNICK M. BERNS,

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Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York
That on March 9, 1976, he served 2 copies of Plaintiff-Appellee's Brief
on

Corporation Counsel,
City of New York,
Municipal Building,
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Nathan Chambers

Sworn to before me this
9th day of March, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977